STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SHERRON LEE SMITH.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

SHERRON LEE SMITH, minor

Respondent-Appellant.

UNPUBLISHED
March 18, 2004

No. 245251
Kalamazoo Circuit Court
Family Division
LC No. 02-000132-DL

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Respondent was found responsible by a jury of four counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e. The order of disposition placed respondent on moderate risk probation and required him to complete fifty hours of community service. Respondent appeals as of right. We affirm.

Respondent first argues on appeal that the prosecution presented insufficient evidence to support a finding that he was responsible for the four counts of CSC IV. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). In addition, intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Finally, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Respondent was found responsible for violation of MCL 750.520e (1)(b), which requires proof that (1) he engaged in sexual contact with another person and (2) force or coercion was used to accomplish the act. In the present case, respondent challenges the sufficiency of the evidence with regard to both of these elements.

MCL 750.520a(n) defines "sexual contact" as including:

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (i) Revenge.
>
> (ii) To inflict humiliation.
>
> (iii) Out of anger.

With regard to the first incident, which involved respondent and two of the four victims, both victims testified that respondent touched their buttocks while ostensibly retrieving a pencil that he had dropped behind their backs on the bus seat on which they were sitting. Both victims further stated that respondent repeated this conduct multiple times during the incident, including after one of the victims had asked respondent to refrain from so doing. Clearly, in the case of both victims, there is evidence a touching of an intimate part occurred, and the first element required for sexual contact as defined by MCL 750.520a(n). Moreover, given the repeated nature of the contact, the fact that respondent committed the same contact with two different victims during this incident, and that the police officer investigating the case testified that respondent said that his actions on the bus were intentional, we believe that a rational trier of fact could conclude that respondent's contact was intentional. In addition, we also believe that respondent's intentional touching of the two victims' buttocks can reasonably be construed as being for the purpose of sexual arousal or gratification, or as being done for a sexual purpose. This is particularly true in light of the fact that the conduct was repeated and was perpetrated against two separate victims. Thus, we believe, upon a de novo review, that with regard to the first incident the prosecution introduced sufficient evidence to justify a rational trier of fact in finding beyond a reasonable doubt that respondent's conduct constituted a sexual contact. See *Johnson, supra* at 723.

Similarly, with regard to the second incident, occurring in the high school cafeteria, involving respondent, three of the four victims, and a fifth student who did not bring charges against respondent, we also believe that the prosecution introduced sufficient evidence to justify a rational trier of fact in finding beyond a reasonable doubt that respondent's conduct constituted a sexual contact. See *id*. All four young women testified that, as they were standing in line to buy lunch in the cafeteria, respondent and a group of his friends came and stood in line behind them and respondent then touched each of the girls on her bottom with his hand, sometimes more than once. Here again, clearly evidence exists that a touching occurred. Further, the fact respondent touched four separate girls during this one incident, and the fact that respondent touched at least two of the victims more than once during the incident, as above, gives rise to a

reasonable inference that respondent's conduct was intentional. Moreover, as above, in light of the repetitive nature of respondent's conduct and the fact that respondent committed the same conduct with four different individuals during the same incident, the jury could reasonably infer that respondent committed these touchings for the purpose of sexual gratification.

With regard to the third incident, the victim testified that respondent chased her down the school hallway, attempted to enter the women's bathroom with her, chased her back down the hallway when she decided instead to return to class, and that he grabbed her from behind and wrapped his arms around her, placing his hands on her breasts for approximately five seconds before she was able to break free. Again, this is clearly evidence that a touching occurred. Moreover, given that respondent chased the victim down, and in light of testimony from the police officer that investigated this case that respondent had told him that the victim "wanted it," the jury could reasonably conclude that respondent's conduct was intentional and that respondent was acting for the purpose of sexual gratification.

Next to the element of force or coercion which, according to the applicable statute, occurs "when the actor overcomes the victim through the actual application of physical force or physical violence," or "when the actor achieves the sexual contact through concealment or by the element of surprise." MCL 750.520e(1)(b)(i) and (v). In light of the testimony described above, the jury could reasonably conclude that the contact in each instance was achieved by the element of surprise, and, therefore, that the prosecution introduced evidence sufficient to justify a rational trier of fact in finding beyond a reasonable doubt that in each of the incidents, from which the present charges arose, respondent acted with force or coercion.

Respondent next argues that the trial court erred in refusing to instruct the jury on the offense of assault and battery, because this crime is a necessarily included lesser offense of CSC IV and because this instruction was supported by the evidence and was requested in a timely manner. Moreover, respondent asserts, by refusing to give this instruction the trial court denied respondent his constitutional right to present a defense. We disagree with both of these arguments.

Both parties agree that an instruction on assault and battery would have been proper in this case if assault and battery were a necessarily included lesser offense of CSC IV because the Michigan Supreme Court has held that a requested jury instruction on a misdemeanor necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element, which is not part of the lesser included offense, and a rational view of the evidence would support it. *People v Cornell,* 466 Mich 335, 357; 646 NW2d 127 (2002). Where the parties differ, however, is in their view as to whether assault and battery is a necessarily included lesser offense of CSC IV. This is, in fact, the determinative question in resolving this issue because, as petitioner has pointed out, while a jury instruction on a necessarily included lesser offense is proper under such circumstances, our Supreme Court has held that an instruction on a cognate offense, in such circumstances, is not only improper, but is not permissible. *Cornell, supra* at 359. Assault and battery is not a necessarily included lesser offense of CSC IV and, therefore, we find that the trial court did not err in refusing to grant respondent's request for the assault and battery jury instruction.

A necessarily included offense is one which must be committed as part of the greater offense, such that it would be impossible to commit the greater offense without first having

committed the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A cognate lesser offense, on the other hand, is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). This Court has held that when a lesser offense is a specific intent crime, while the greater offense is a general intent crime, proof of the lesser is not established by proof of the greater general intent offense. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). In other words, pursuant to *Corbiere*, a lesser offense that is a specific intent crime cannot be a necessarily included lesser offense of a greater offense that is a general intent crime, because it is possible to commit the greater offense without having first committed the lesser offense.

In the present case, assault and battery, the claimed lesser included offense, is a specific intent crime. *People v Lakeman*, 135 Mich App 235, 240; 353 NW2d 493 (1984). And CSC IV is only a general intent crime. *People v Lasky*, 157 Mich App 265, 272; 403 NW2d 117 (1987). Accordingly, pursuant to *Corbiere*, assault and battery cannot be a necessarily included lesser offense of CSC IV, because it is possible to commit CSC IV without committing assault and battery. Because assault and battery is a cognate offense, and not a necessarily included lesser offense of CSC IV, the trial court was not permitted to give the assault and battery instruction. *Cornell, supra* at 359. As a result, the trial court did not err when it denied respondent's request for an assault and battery jury instruction. Moreover, because the trial court did not commit any error in denying the requested instruction, the court also did not deny respondent his constitutional right to present a defense by so doing.

Finally, respondent argues that the prosecution intentionally and deliberately injected a prejudicial and irrelevant matter into the trial during questioning of a rebuttal witness, that this act unfairly prejudiced respondent, and that the error was incurable by any instruction. We disagree.

A respondent's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, even when preserved, a nonconstitutional error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999), citing *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

During the examination of a witness the prosecution asked questions including one with regard to whether the witness referred to defendant as a predator when she spoke to the police and also asked the same witness whether she was aware of other information regarding defendant. The challenged questions were improper because they interjected issues broader than the guilt or innocence of the accused. However, they were not outcome-determinative, because any prejudicial effect of the comments was cured when the trial court sustained respondent's objections to the improper comments, admonished the prosecutor in front of the jury for the improper conduct, and instructed the jury not to consider any testimony that the court had either excluded or stricken during the trial. The challenged questions were not particularly significant and the trial court cured any error. In addition, defendant has not demonstrated that the prosecution's improper questions resulted in a miscarriage of justice. See *Brownridge (On Remand), supra* at 216.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage